IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8426 of 2001

with

CIVIL APPLICATION No 12992 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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DIVISIONAL CONTROLLER

Versus

LAXMANSINH A. BARAIYA

Appearance:

1. Special Civil Application No. 8426 of 2001

MR MITUL K SHELAT for Petitioner No. 1

MR JS BRAMBHATT for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 05/04/2002

ORAL JUDGEMENT

#. Heard Learned advocate Mr.Mittul Shelat appearing on behalf of the petitioner Corporation and Mr.J.S.Brambhatt, learned advocate for respondent workman.

#. This Court has issued notice on 26th September, 2001 and also issued notice as to interim relief.

Rule. Mr.J.S.Brambhatt, learned advocate for respondent workman waives formal service of notice for respondent workman.

#. In the present petition, the petitioner Corporation has challenged the award passed by the Industrial Tribunal, Ahmedabad in Complaint [I.T.] No.116 / 1996 in Reference [IT] No.63 / 1996 dated 29th January, 2000 wherein the tribunal has set aside the order of dismissal dated 26th September, 1996 and granted reinstatement with continuity of service with full backwages of the interim period with cost of Rs.1000/-.

#. Learned advocate Mr.Mittul Shelat appearing for petitioner Corporation has submitted that the tribunal has committed gross error in coming to the conclusion that the complaint under Section 33-A of the I.D.Act is maintainable. He has also submitted that the tribunal has committed error in coming to the conclusion that Section 33 of the I.D.Act is violated. He also submitted that the tribunal has reappreciated the evidence which was led in the departmental inquiry and also considered the question of jurisdiction of the Inquiry Officer when legality and validity of the inquiry was not challenged by the respondent workman and thus, this is clear error committed by the tribunal. Mr.Shelat also submits that the tribunal has not appreciated the facts of deposition given by the respondent workman before the tribunal that he was earning Rs.20/- per day even though full backwages of the interim period has been granted by the tribunal. Mr.Shelat, learned advocate has also submitted that the approval application was submitted before the Conciliation Officer being No.737 / 1996 which was granted by order dated 26th May, 1997 but this aspect has been overlooked by the tribunal. Therefore, Mr.Shelat submits that the errors committed by the tribunal requires to be interfered with by this Court in the interest of justice.

#. Learned advocate Mr.J.S.Brambhatt for respondent workman has submitted that approval application which was filed by the Corporation before the Conciliation officer where no industrial dispute was pending and therefore,

such approval having no legal effect and no such approval is filed which required under Section 33[2][b] of the I.D.Act, 1947 before the Tribunal. Therefore, the tribunal has rightly come to the conclusion that Section 33 of the I.D.Act has been violated and as a result thereof, complaint under Section 33-A of the Act is maintainable. He also submits that legality and validity of the inquiry procedure was not challenged but competency of the inquiry officer was challenged by the respondent workman which has been rightly appreciated by the tribunal and therefore, no error has been committed by the tribunal while granting the relief in favour of the respondent workman and hence, no interference of this Court, in such situation, is called for.

#. I have considered submission made by the learned advocates for the parties. It is necessary to note one important aspect that the respondent workman was dismissed from service on 26th September, 1996, for that, approval application under Section 33[2][b] of the I.D. Act, 1947 filed by the Corporation before the Conciliation Officer, Ahmedabad being No.737 / 1996 wherein the order has been passed granting approval on 26th May, 1997. When the matter was taken up for hearing, a pertinent question was asked to learned advocate Mr.Mittul K. Shelat by this Court that this approval which was filed before the conciliation officer has been filed in which dispute was pending. However, this fact does not become clear from the order and whether the corporation is able to satisfy the court that such Approval is filed before the conciliation officer in a particular dispute. Learned advocate Mr.Shelat very frankly and fairly submitted that no such industrial dispute was pending before the conciliation officer when the approval application was filed by the Corporation. Therefore, considering the relevant provisions of Section 33[3][b] of the I.D.Act, approval application is required to be filed before the authority whom the industrial dispute is pending, wherein the workman must have concern in such dispute. But when there is no dispute at all pending with any authority, then there is no need to file approval application under Section 33[2][b] of the I.D.Act. The relevant provisions of Section 33[2] is quoted as under :-

"33[2] During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute [or, where there are no such standing orders, in accordance with the terms of the

contract, whether express or implied, between him and the workman],-

[a] alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

[b] for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman:

provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceedings is pending for approval of the action taken by the employer."

#. Thus, the provisions of the Section itself makes it clear that during the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute, for any misconduct not connected with the dispute, discharge or punish, whether by dismissal or otherwise, that workman, provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceedings is pending for approval of the action taken by the employer. Therefore, pendency before such authority of industrial dispute, wherein workman is concerned is a condition precedent for filing approval application. If undisputedly, industrial dispute was not pending before the conciliation officer, then approval application under Section 33-2-b cannot be filed and if it was filed and if any order is passed by the conciliation officer, same shall have to be considered without jurisdiction and it will not have any legal effect. Therefore, the Corporation ought to have filed approval application before the tribunal, wherein the Reference [IT] No.63 / 1996 was pending wherein the dispute the workman concerned and therefore, not to file approval application before the tribunal, the tribunal has rightly held that Section 33 is violated and therefore, complaint under Section 33-A is maintainable. The relevant provisions under Section 33-A is referred as under :-

"33-A Special provision for adjudication as to

whether conditions of service, etc. changed during pendency of proceedings -

Where an employer contravenes the provisions of Section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal], any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner -

[a] to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and "

#. Once the complaint is maintainable, the same is treated as Reference referred by the concerned authority for adjudication and the tribunal or the Labuor Court is entitled to adjudicate the issue which has been raised in complaint as if the matter has been referred by the State Government. Therefore, according to my opinion, the tribunal has rightly entertained the complaint and adjudicated the issue raised in the complaint.

#. The allegation which was made against the respondent workman that on 17th July, 1994 he was on route Bariya to Bodeli as conductor, at that time, his bus was checked at Vanki by the checking staff, wherein 24 passengers were found in the bus. Out of said 24 passengers, from two passengers of one group the workman though collected the fare of Rs.2.50 ps at the rate of Rs.1.25 ps but not issued the tickets but after seeing the checking staff, the workman had issued the tickets by making wrong punch mark upon the said tickets and said tickets were not shown in the way bill. Similarly, from three passengers of one another group travelling from Nani Lez to Kantava the workman though collected the fare of Rs.6 instead of Rs.3.75 ps. at the rate of Rs.1.25 not returned the refund and not issued the tickets and at the time of checking, refused to give impugned tickets. During checking, Rs.38/- was found excess in S.T. Cash and the workman also denied to sign the form, so also refused to sign the statement of the passengers. On the basis of the said allegations, chargesheet dated 6th Sept. 1994 was served on the respondent workman and thereafter departmental inquiry was initiated by the Assistant Administrative Officer of S.T.Godhara and thereafter, show cause notice was served and ultimately the respondent workman was dismissed on 26th September, 1996

by the competent authority. In view of these factual aspects, contention was raised by the respondent workman before the tribunal that chargesheet was served by the competent authority - Divisional Traffic Superintendent [Default] and inquiry was conducted by the Assistant Administrative Officer who was not authorised under the Rules and therefore, he was not competent authority under the Rules and hence, the entire inquiry which was conducted by the Assistant Administrative Officer is without jurisdiction. Before the tribunal, the complaint was filed by the respondent workman and vide Exh.9 written statement was filed by the petitioner Corporation and thereafter the respondent workman has produced documentary evidence vide Exh.5 and the petitioner Corporation has produced documentary evidence vide Exh.17 to 32. Thereafter, the respondent workman has filed purshis vide Exh.33 that he is not challenging the departmental inquiry but he is challenging the finding recorded by the inquiry officer. Thereafter, no oral evidence was led by either side and oral evidence was closed vide Exh.34 and then the mater was heard by the tribunal. Both the parties cited various authorities before the tribunal in support of their case. After considering the submission made by both the parties, the tribunal has raised the issue; whether the inquiry officer having jurisdiction and power to hold the inquiry against the workman concerned and whether the finding recorded by the inquiry officer is baseless or perverse or not; whether dismissal order which has been passed is just and proper or not; and lastly, whether provisions of Section 33 of the Act violated by the petitioner or not. These are the issues framed by the tribunal. Thereafter, the tribunal has examined each issue and come to the conclusion that chargesheet given by the competent authority Divisional Traffic Superintendent [Default] and the inquiry was conducted by the Assistant Administrative Officer. The petitioner corporation was not able to justify by producing any Rules or documents in support of the fact that Assistant Administrative Officer was competent Authority to hold departmental inquiry proceedings. Not only that, the petitioner Corporation was not able to produce any record that inquiry which was conducted by the Assistant Administrative Officer has been entrusted by any Officer to the concerned officer. NO such document was produced by the petitioner Corporation before the Tribunal. Therefore, the tribunal has come to the conclusion that the departmental inquiry which was conducted by the Assistant Admn. Officer is without jurisdiction. Thereafter, the tribunal has examined the approach of the inquiry officer to the effect that instead of proving the misconduct against the

respondent workman, the inquiry officer has considered that whether the workman has proved his innocence or not. This type of approach of the inquiry officer has been held by the tribunal as contrary to the principles of natural justice. According to the tribunal, the allegations made by the petitioner Corporation against the respondent workman, then the allegations are required to be proved by the petitioner Corporation by leading oral and documentary evidence in the departmental inquiry. But the burden was not upon the workman to prove otherwise. Therefore, the tribunal has rightly appreciated the approach of the inquiry officer which was found contrary to the settled position of law and the tribunal has come to conclusion that on record the Corporation has not proved the misconduct against the respondent workman but the inquiry officer has presumed that misconduct is proved against the respondent workman. He also appreciated that the dispute which has been raised or contention which has been raised by the respondent workman in departmental inquiry, for that, no oral or documentary evidence has been produced by the petitioner Corporation in departmental inquiry. The statements of passengers which was recorded by the reporter checking inspector, wherein no signature has been made by the respondent workman but that passengers were not examined by the petitioner Corporation in departmental inquiry. When statement of passengers were not admitted and accepted by the respondent workman or where no signature is made by the respondent workman, then such statement is required to be proved by the petitioner Corporation before the inquiry officer by examining such passengers but no such passenger was examined in departmental inquiry. Therefore, the allegation made against the respondent workman that he recovered the fare from the concerned passengers is not found to have proved in absence of evidence of the passenger and statements which were obtained by the checking inspector were not proved in departmental inquiry. In respect of cash amount which was found to be excess, the respondent has explained that four tickets of Rs.10.50 ps were already sold and not noted in the way bill but that amount has not been taken into account while calculating the traffic cash and this fact has been admitted by the reporter in his cross examination that this amount is not included and if it is taken into account, then there was no question of any excess fund in the traffic cash of the respondent workman. Therefore, the tribunal has come to conclusion that considering the approach adopted by the inquiry officer and the methodology to inquire and not to prove misconduct against the respondent workman by leading independent

evidence relied upon said statements, the tribunal has rightly come to the conclusion that finding which was recorded by the inquiry officer is baseless and perverse. He also come to the conclusion that not to give statement before the checking Inspector when the bus was checked cannot be considered to be misconduct because it is voluntary act of the conductor if he desire, or otherwise, can refuse to give statement. Such refusal cannot be considered to be misconduct because it is his choice whether he was to give statement or not. It is also considered that it was upon the respondent workman to sign the statements of the passengers or not but the workman can also refuse to sign the statement and this act cannot be said to be misconduct because afterall it is proceeding which will be initiated on the basis of such statement or statement of the conductor. Therefore, authority cannot compel the respondent workman to give statement or to sign the statement of the passengers. Therefore, after considering the evidence as it is on record in the departmental inquiry, the tribunal has come to the conclusion that the finding recorded by the inquiry officer is baseless and perverse and further come to the conclusion that Section 33 of the Act has been violated because the approval application was not preferred before the tribunal and this fact remained undisputed between the parties. The tribunal has also examined that if Section 33 is violated, then complaint is maintainable and looking to the evidence as it is led in the departmental inquiry and finding recorded by the inquiry officer which found to be baseless and perverse, then the order of dismissal is found to be illegal by the tribunal. In above view of the matter, the decision of the tribunal cannot be considered to be illegal and legal and valid order has been passed by the tribunal while exercising the powers under Section 33-A, the tribunal is entitled to consider validity and legality of the finding whether it is based on legal evidence or not. This aspect has been considered by the Apex Court in case of CENTRAL BANK OF INDIA reported in 1969 [2] LLJ 377 and in that view of the matter,the tribunal has rightly examined the legality and validity of the finding and for that, the tribunal has not committed any error in coming to the conclusion. Therefore, the tribunal has rightly set aside the order which was based upon the perverse and baseless finding and granted reinstatement with continuity of service.

##. Now the question is required to be examined in light of other angle. Let us presume that approval application which was filed by the Corporation before the Conciliation Officer. Undisputedly, that application was

without jurisdiction because learned advocate for petitioner Corporation Mr.Shelat has fairly admitted the situation that when the approval application was filed before the conciliation officer, where no industrial disputes was pending. It was specific question was asked to the learned advocate for petitioner Mr.Shelat, who in reply has admitted that no such conciliation or industrial dispute was pending wherein the approval under Section 33-2-b of the I.D. Act was filed. Therefore, if no industrial dispute was pending before the conciliation officer, then there is no need to file approval application by the employer under Section 33-2-b of the I.D.Act. Therefore, the order passed by the conciliation officer in Approval Application No.737 / 1996 dated 26th May, 1997 is without jurisdiction and nullity. If this legal position is taken into account, then it is case of no approval filed by the employer when the industrial dispute was pending before the tribunal being No.63 / 1996, wherein undisputedly the respondent workman was concerned in such dispute. This aspect of non approval would result as nonest order of dismissal. This view has been recently taken by the Full Bench of the Apex Court in case of JAIPUR Z.S.B.V. BANK LTD. SHRI RAM GOPAL SHARMA reported in 2002 Lab.I.C. pg.513. The relevant observations made in para-13 to 15 are referred as under :-

"13. The proviso to Section 33[2][b], as can be seen from its very unambiguous and clear language, is mandatory. This apart, from the object of Section 33 and in the context of the proviso to Section 33[2][b], it is obvious that the conditions contained in the said proviso are to be essentially complied with. Further any employer who contravenes the provisions of Section 33 invites a punishment under S.31[1] with imprisonment for a term which may extend to six months for a term which may extend to Rs.1000/or with both. This penal provision is again a pointer of the mandatory nature of the proviso to comply with the conditions stated therein. To put it in other way, the said conditions being mandatory, are to be satisfied if an order of discharge or dismissal passed under Section 33[2] [b] is to be operative. If an employer desires to take benefit of the said provision for passing an order of discharge or dismissal of an employee, he has also to taken the burden of discharging the statutory obligation placed on him in the said proviso. Taking a contrary view that an order of

discharged or dismissal passed by an employer in contravention of the mandatory conditions contained in the proviso does not render such an order inoperative or void, defeats the very purpose of the proviso and it becomes meaningless. It is well settled rule of interpretation that no part of statute shall be construed as unnecessary or superfluous. The proviso cannot be diluted or disobeyed by an employer. He cannot disobeyed by an employer. He cannot disobey the mandatory provision and then say that the order of discharge or dismissal made in contravention of Section 33[2][b] is not void or inoperative. He cannot be permitted to take advantage of his own wrong. The interpretation of statute must be such that it should advance the legislative intent and serve the purpose for which it is made rather than to frustrate it. The proviso to Section 33[2][b] affords protection to a workman to safeguard his interest and it is a shield against victimization and unfair labour practice by the employer during the pendency of industrial dispute when the relationship between them are already strained. An employer cannot be permitted to use the provision of Section 33[2][b] to ease out a workman without complying with the conditions contained in the said proviso for any alleged misconduct said to be unconnected with the already pending industrial dispute. The protection afforded to a workman under the said proviso cannot be taken away. If it is to be held that an order of discharge or dismissal passed by the employer without complying with the requirements of the said proviso is not void or inoperative, the employer may with impunity discharge or dismiss a workman.

14. Where an application is made under Section 33[2][b], Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bonafide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously if follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed

invoking Section 33[2][b] dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. IN other words, this relationship comes to a end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is not need of separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and trouble inasmuch he can straightway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33-A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33[2][b]. It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33[2][b], Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of approval granted.

15. The view that when no application is made

> or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set side under Section 33A, cannot be accepted. In our view, not making an application under Section 33[2][b] seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33[2][b]. An employer who does not make an application under Section 33[2][b] or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him. Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of Section 33[2][b] proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31[1]. Such an approach destroys the protection specifically and expressly given to an employee under the said proviso an against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employer can be saved from hardship of unemployment."

##. In light of above referred decision that even the tribunal has not passed the order on merits considering the view taken by the Apex Court, according to my opinion, dismissal order has become nonest because no approval was filed by the employer under Section 33-2-b of the I.D.Act, 1947 when the respondent workman was dismissed from service. Therefore, on both these counts, not to file approval application before the appropriate authority and by tribunal, finding the order of dismissal is rightly held invalid nonest. In view of above observations of the Apex Court that order automatically

becomes nonest and inoperative in the eyes of law.

##. Now the question is required to be examined in respect of backwages of the interim period, wherein the tribunal has granted full backwages of the interim period. Before the tribunal, the respondent workman has admitted gainful employment of Rs.20/- per day earned by the workman by doing miscellaneous work. This aspect has not been taken into account by the tribunal while granting relief of full backwages. One more aspect which requires consideration that the matter was pending before the tribunal for four years and the petitioner Corporation being the public body and therefore considering three aspects, according to my opinion, if amount of full backwages is reduced by 25 per cent for the interim period, will meet the ends of justice. Accordingly, the order of tribunal granting full backwages is reduced by 25 per cent, the respondent workman is entitled to 75 % backwages of the interim period from the date of dismissal till the date of order 29th January, 2000.

##. In the result, present petition is partly allowed. The order granting backwages is modified to the effect that the respondent workman is entitled to 75 % backwages of the interim period instead of full backwages of the interim period from the date of dismissal till the date of order dated 29th January, 2000. Rest of the directions granting reinstatement with continuity of service remains intact and not disturbed by this Court.

##. Learned advocate Mr.J.S.Brambhatt for respondent workman submits that the tribunal has passed the order on 29th January, 2000 and the petition has been filed by the petitioner Corporation on 24th September, 2001 and this Court has issued notice on 26th September, 2001. It is further submitted that Civil Application claiming relief under Section 17-B of the I.D.Act is filed on 27th November, 2001 and wherein order has been passed by this Court on 21st December, 2001 with direction to the petitioner Corporation to pay wages under Section 17-B of the Act to the respondent workman immediately. However, learned advocate Mr.Brambhatt has submitted that no such benefits under Section 17-B of the Act has been paid to the respondent workman by the petitioner Corporation and therefore, some suitable directions may be issued on the petitioner Corporation. Considering submissions of the learned advocate Mr.Brambhatt for respondent, it is directed to the petitioner Corporation to reinstate the respondent workman within period of one month from the date of receiving the copy of this order. The petitioner

Corporation is further directed to pay 75 % backwages to the respondent workman for the period from 26th September, 1996 till 29th January, 2000 within period of two months from the date of receipt of a copy of this order. It is further directed to the petitioner Corporation to pay full wages from 29th January, 2000 till the date of actual reinstatement in service to the respondent workman within period of three months from the date of reinstatement.

Rule is made absolute to the aforesaid extent. No order as to cost.

In view of above order passed by this Court in main matter, no order is required in Civil Application No.12992 / 2001 in Special Civil Application No.8426 / 2001 and the same stands disposed of accordingly. Rule discharged accordingly. Ad-interim relief, if any, stands vacated.

Direct Service is permitted to the respondent.

Date : 4-4-2002 [H.K.Rathod, J.]

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